No. 76-5935

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioners contend that the imposition of a fine as a condition of their probation under the Federal Youth Corrections Act was unlawful. Petitioner Durst also contends that the additional requirement of restitution was unlawful.

Petitioners Durst and Rice were convicted following their pleas of guilty in the United States District Court for the District of Maryland of having obstructed the mails, in violation of 18 U.S.C. 1701. Petitioners Blystone and Pinnick were convicted following their pleas of guilty of having stolen property with a value of less than $100 from a government reservation, in violation of 18 U.S.C. 661. Petitioner Flakes was convicted following his plea of guilty of having stolen property belonging to the United States with a value of less than $100, in violation of 18 U.S.C. 641 (see Pet. 2-3).

Petitioner Durst was given a suspended sentence of six months' imprisonment and was placed on probation for three years under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); as conditions of his probation, he was fined $100 and ordered to pay $160 in restitution. Petitioner Rice was given a suspended sentence of six months' imprisonment and was placed on probation for two years under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); payment of a fine of $100 was imposed as a condition of his probation. Petitioners Blystone and Pinnick were placed on probation for two years and one year, respectively, under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); each was ordered to pay a fine of $100 as a condition of their probation. Petitioner Flakes was placed on probation for one year under the Federal Youth Corrections Act, 18 U.S.C. 5010(a); he was ordered to pay a fine of $50 as a condition of his probation (Pet. 2-4). After having consolidated petitioners' appeals, the court of appeals affirmed per curiam on the authority of its prior decision in United States v. Oliver, petition for a writ of certiorari pending in No. 76-5632 (Pet. App.).

The decision of the court of appeals is supported by the terms of the Federal Youth Corrections Act as well as by the Act's legislative history. The provision of the Federal Youth Corrections Act under which petitioners were sentenced, 18 U.S.C. 5010(a), states that "[i]f the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation." Nothing in this provision precludes the imposition of a fine or an order requiring restitution as

conditions of probation. Indeed, a related provision of the Act, 18 U.S.C. 5023(a), expressly provides that nothing in the Act shall "be construed in any wise to amend, repeal or affect" the provisions of 18 U.S.C. 3651 "relative to probation." The latter statute specifically states, inter alia, that "[w]hile on probation and among the conditions thereof, the defendant * * * [m]ay be required to pay a fine in one or several sums * * * ."

Moreover, 18 U.S.C. 5010(b), which authorizes the commitment of youth offenders to the custody of the Attorney General for treatment and supervision, provides for commitment "in lieu of the penalty of imprisonment" that might otherwise be imposed. As the court of appeals pointed out in United States v. Oliver, supra, [1] the original draft of the Act submitted to Congress by the Judicial Conference Committee on Punishment for Crime contained somewhat different language, stating that commitment under the Act was to be "in lieu of the penalty otherwise provided by law" (Add., infra, p. 7). The court of appeals correctly concluded in Oliver that this substitution suggests that Congress "intended to preclude only the power to imprison in an ordinary prison rather than in a youth facility when sentencing under the Act" (ibid.).

Finally, the legislative history of the Federal Youth Corrections Act confirms that the Act's principal purpose was to promote the rehabilitation of youthful offenders. E.g., H.R. Rep. No. 2979, 81st Cong., 2d Sess. 4 (1950). Imposition of a fine is not inconsistent with that goal. Indeed, imposition of a fine may assist in the rehabilitation process -- particularly

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1/ A copy of the court of appeals' opinion in Oliver is attached (Add., infra).

when, as here, the court chooses to place the defendant on probation -- by impressing upon the defendant the seriousness of his conduct and the undesirability of repeating it. Moreover, a requirement of restitution simply obligates the defendant to return to his victim the proceeds of his offense. It thus advances rather than detracts from the policy of rehabilitation.

Although we thus believe that the court of appeals' decision is correct, we recognize that the decision conflicts with decisions of the Ninth Circuit (United States v. Bowens, 514 F. 2d 440 (per curiam); United States v. Mollet, 510 F. 2d 625 (one judge dissenting)). The rationale of the decision is also at least arguably inconsistent with the decision of the Fifth Circuit in Cramer v. Wise, 501 F. 2d 959, holding that a court may not commit a defendant for treatment and supervision under 18 U.S.C. 5010(b) and, at the same time, require payment of a fine. Accord, United States v. Hayes, 474 F. 2d 965 (C.A. 9). We therefore do not oppose the granting of the petition.[2/]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

2/ We have suggested in our memorandum in United States v. Oliver, supra, that if the Court decides to grant the petition in this case, the petition in Oliver should be held pending a decision here on the merits. The reason for that suggestion is that this case involves an order requiring restitution as well as an order requiring the payment of fines. Even if a court may not impose a fine as a condition of probation under 18 U.S.C. 5010(a), we believe that an order requiring restitution is entirely proper.

ADDENDUM

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-2161

UNITED STATES OF AMERICA

Appellee

v.

MICHAEL CORRELL OLIVER

Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued April 9, 1976 Decided October 5, 1976.

Before CRAVEN and WIDENER, Circuit Judges, HADEN, District Judge*.

Bennie L. Dunkum [court-appointed counsel] for Appellant; Joseph L. Cioline, Attorney, Department of Justice (William B. Cummings, United States Attorney, David A. Schneider, Assistant United States Attorney, Richard L. Thornburgh, Assistant Attorney General and Robert L. Keuch on brief) for Appellee.

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* United States District Court for the Northern and Southern Districts of West Virginia, sitting by designation.

WIDENER, Circuit Judge:

The sole question raised on this appeal is whether the imposition of a fine as a condition of probation is compatible with the rehabilitative purposes of the Youth Corrections Act, 18 USC § 5010. We are of opinion that it is and affirm.

The appellant in this action, Michael Oliver, pleaded guilty on October 10, 1972 before the United States District Court for the Western District of Virginia to a charge of distributing marijuana, a Schedule I controlled substance, in violation of 21 USC § 841(a)(1). Because of his status as a youth offender under 18 USC § 4209, he was eligible for sentencing under the Youth Corrections Act. Accordingly, the court imposed the following sentence:

> "IT IS ADJUDGED that the defendant is sentenced to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to the Federal Youth Corrections Act, 18 USC § 5010(b), and the execution of the sentence is suspended

> and defendant is placed on probation for a period of THREE (3) YEARS pursuant to 18 USC § 5010(a), and fined the sum of $1500, to be paid as directed by his supervising probation officer."

Effective January 3, 1973, jurisdiction over Oliver during the period of his probation was transferred to the Eastern District of Virginia where he maintained his permanent residence. On September 23, 1975, Oliver's probation officer made complaint to the United States District Court for the Eastern District of Virginia charging that he had not been complying with the special condition of his probation in that he had not adequately kept up with his fine payments. Oliver's probation officer requested a hearing to determine whether probation should be revoked.

A hearing was held on the complaint on September 29, 1975, at which time it was determined that Oliver had paid but $675 of the original $1500 fine imposed instead of $50 per month which Oliver and the probation officer had agreed should be paid. Based

upon this, the court construed the sentence of the Western District to be a fine as a condition of probation and found it had been violated by non-payment. Oliver's period of probation was extended for a period of one year from October 9, 1975 (the expiration date of the original probation period), and the balance due on the original fine was ordered paid within three months.

Oliver contends here, as he did at the hearing when his probation was extended, that the imposition of a fine as a condition of probation is impermissible under 18 USC § 5010(a), which provides:

> "If the court is of opinion that the youth offender does not need commitment it may suspend the imposition or execution of sentence and place the youth offender on probation."[1]

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1. § 5010(b) provides:

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter."

He further asserts that the order below extending the probation and requiring the payment of the fine, which was brought about by, and based upon, his failure to pay the fine in question, must be set aside.

In support of his position as to the propriety of fines under the Youth Corrections Act, the appellant cites a series of cases from the Ninth Circuit. See United States v. Hayes, 474 F2d 965 (9th Cir. 1973); United States v. Mollet, 510 F2d 625 (9th Cir. 1975) (one judge dissenting); United States v. Bowens, 514 F2d 440 (9th Cir. 1975). In Hayes, the court, after concluding that the imposition of a fine was punitive in nature, found that a combination of rehabilitative confinement under 18 USC § 5010(b) and a fine was improper under the Youth Corrections Act. This position was followed in Mollet and again in Bowens and extended its prohibition to suspended sentences imposed under 18 USC § 5010(a), being of opinion that a trial court's election to commit a youthful offender for rehabilitative treatment under the alternative sentencing provisions of the Youth Corrections Act foreclosed the imposition of a fine, certainly,

and probably even the restitution of stolen funds, as a condition of probation.

The Fifth Circuit, in Cramer v. Wise, 501 F2d 959 (5th Cir. 1975), has agreed with Hayes, thus lending support to the defendant's position.[2]

With deference to those cases, we are unpersuaded that the imposition of a fine is inconsistent with the purposes of the Youth Corrections Act. We begin with the observation, as did the court in Cramer, p. 961, that the Youth Corrections Act, by its terms, does not prohibit the imposition of monetary fines, but only precludes the imposition of a prison sentence.

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2. Hayes and Cramer are distinguishable on their facts from the case at hand, while Mollet and Bowens are not. The defendant properly does not rely on United States v. Waters, 437 F2d 722 (D.C. Cir. 1970), and the case is mentioned here only to indicate it has not been overlooked.

Moreover, the statutory language represents a significant change from the original draft of the Act submitted to Congress by the Judicial Conference Committee on Punishment of Crimes. The Conference draft provided:

> "[T]he court may, as a penalty for the offense and in lieu of the penalty otherwise provided by law, sentence the youth offender to the custody of the Authority for treatment and supervision until discharged. . . ." [Emphasis added]

See Cramer at 961. Rather than adopting the broad language of the Conference, Congress chose to amend the draft to read "in lieu of the penalty of imprisonment," 18 USC § 5010(b), rather than "in lieu of the penalty otherwise prescribed by law" as used in the Committee draft. It would appear, therefore, that Congress intended to preclude only the power to imprison in an ordinary prison rather than in a youth facility when sentencing under the Act. Of course, the length of the sentence is also affected. As such, neither the statutory language nor the Act's legislative history supports the interpretation contended for by the defendant.

In addition, we are of opinion that an interpretation of the Act which would preclude the trial court from imposing a fine as a condition to probation would not only be contrary to the literal wording of the statute, but would also diminish the liberal use of the probation alternative. This was held in United States v. Kitson, No. 74-211-ORL-Cr-R (M.D. Fla. 1975), in which a sentencing judge construed Hayes as only limiting the power to impose a fine in addition to commitment under § 5010(b), not as a condition of probation when commitment was suspended under § 5010(a). The court in Kitson relied on 18 USC § 3651 which expressly authorizes payment of "a fine in one or several sums" as a condition of probation. And 18 USC § 5023 of the Act specifically provides that nothing in the Act shall be "construed in any wise to amend, repeal, or affect the provisions of [§ 3651 et seq]".

Other similar reasons are equally persuasive. As the legislative history points out, United States Code Congressional Service, Vol. 2, 81st Congress 2d Session, 1950, p. 3891, et seq, the statute is based on the Borstal system in England in use for more than

seventy years. The three cardinal principles which dominate that system are flexibility, individualization, and emphasis on the intangibles. Flexibility there is said to mean that a premium is placed on experimentation and originality. In Dorzynski v. United States, 418 US 424 (1974), at p. 436, the court stated that "[t]he legislative history clearly indicates that the Act was meant to enlarge, not to restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort," and on page 437 it continued "[t]hus apart from the discretion vested in administrative agencies for those committed under the Act,. . .the Act was intended to broaden the scope of judicial sentencing discretion to include the alternatives of treatment or probation thereunder."

One principal difference in treatment is that for ordinary criminals confinement is in a penitentiary, while youth offenders are first classified and then confined for correctional treatment in a youth facility, segregated from other offenders. See § 5011. Another incidental benefit is that a youth offender upon release from confinement or probation may receive a certificate setting aside his conviction. See § 5021.

In view of the fact that we think Congress intended to increase the flexibility of the remedies a district judge might use in sentencing, that is to say it meant to increase the alternatives a district judge may resort to, we are of opinion that the denial of the power to impose a fine in connection with probation would not be consistent with congressional intent. It seems to us that taking away the power of the district courts to impose fines in connection with probation would decrease, rather than increase, the alternatives available to the district courts. The dissent in Mollet and Kitson agree with this reasoning.

We are not unmindful of the fact that the theme of the cases taking the opposite view is that fines are necessarily retributive punishment and are inconsistent with rehabilitative treatment.[3] Yet, by permitting district judges to impose fines in connection with probation as another degree of punishment rather than leaving the district judge the more circumscribed alternatives of probation or confinement, is the district court not placed in a better position to do substantial justice and to avoid the confinement of the youth offender in more cases than would otherwise be possible? We think it would.

The judgment of the district court is accordingly

AFFIRMED.

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3. That a fine may in a sense be retributive, does not, we think, make it necessarily inconsistent with rehabilitation, especially as here when it enables a district judge to have a greater range of remedies at his disposal and may enable him in countless cases to dispose of the matter without confinement.